77-1771

No. _____

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs

SIGMUND G. ZAWACKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE INLAND PRESS, DETROIT, MICHIGAN

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No. _____

IN THE

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PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs

SIGMUND G. ZAWACKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Provident Life & Accident Insurance Company, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the entitled case.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (Appendix A, p. 13) are not reported. The judgment of the Court of Appeals (Appendix B, p. 19) is not reported. The Order of the Court of Appeals denying rehearing (Appendix B, p. 20) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 3, 1977. A timely petition for rehearing was denied on June 15, 1977. No extension of time for filing a petition for certiorari was requested or received. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

This petition presents an important question relating to the scope and applicability of Fed R Civ P 56, governing summary judgment, and relating to appellate review of a judgment rendered thereunder. A summary judgment motion in a proper case provides a most important tool in the orderly and timely disposition of cases in the Federal Court. However, the treatment accorded such proceedings by the Court of Appeals in the present case renders the summary judgment motion utterly futile.

The fundamental question is whether a Court of Appeals, in the face of record agreement by the parties that material facts are not in dispute, and assertions by both parties that the contractual clause to be interpreted is not ambiguous, in all of which the District Court concurred in a detailed and carefully considered opinion granting summary judgment to Petitioner, may reverse the judgment of the District Court upon independent conclusory findings that "facts developed thus far do not appear to be sufficiently uncontroverted to warrant summary judgment," and "there is ambiguity in the exception clause relied upon by both parties," without specifying any of the considerations upon which it based its conclusions. (Appendix B, p. 19)[1]

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 56, Federal Rules of Civil Procedure, provides in pertinent part as follows:

[1] This Petition presents an additional question which, although not relied upon as a reason for granting the Writ, will be presented to the Court as a ground for reversal in the event the Petition is granted. The question is whether an independent ground for the granting of summary judgment not discussed by the U.S. District Court because of its holding that the other ground was sufficient, and not treated by the Court of Appeals, is not itself a ground for sustaining the U.S. District Court's grant of summary judgment.

Rule 56.
SUMMARY JUDGMENT

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The judgment sought shall be rendered forthwith if the pleadings, . . . together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

(e) *Form of Affidavits; Further Testimony; Defense Required.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT OF THE CASE

The facts are as stated in the pleadings, including all well-pleaded non-conclusory allegations in the Complaint, and as particularly stated in the Affidavit of Edward J. Zaleski, M.D., an affidavit submitted by Respondent. For ease of reference this short Affidavit is reproduced at Appendix C (Appendix pages 33a-34a as filed in the United States Court of Appeals for the Sixth Circuit; hereinafter, App. 33a-34a).

Respondent subscribed to an accidental death policy issued by Petitioner, which covered Respondent and Respondent's decedent on February 23, 1974. On that date, Respondent's decedent fractured her hip as a result of an accidental fall, in Jamaica, the West Indies. On February 25, 1974, she underwent surgery in Michigan involving the placement of a pin ("a Jewett nail") in her hip to affix the fracture. After this surgical placement, Respondent's decedent developed a post-operative wound infection (Appendix C, Paragraph 6). This post-operative wound infection resulted in a bacterial infection known as a pyogenic infection (Appendix C, Paragraph 5). Respondent's decedent died April 14, 1974, from what Petitioner concedes for this motion was a pyogenic infection. The primary contributing factor to the death was the infected hip fracture; the secondary contributory factor was diabetes mellitus.

Respondent's subsequent application for benefits under Petitioner's policy of insurance was declined by Petitioner. The pertinent provisions of the policy of insurance provided for the payment of benefits in the event of accidental death. The policy further provided:

> "No Accidental Death Insurance shall be payable for any loss caused directly or indirectly, wholly or partly by:
>
> (a) Mental infirmity, ptomaines, bacterial infections (except pyogenic infections which shall occur simultaneously with and through an accidental cut or wound), or any kind of sickness or disease."

Respondent, a citizen of Michigan, brought suit on October 7, 1974, in a Michigan Court against Petitioner, a Tennessee corporation with its principal offices in Tennessee, seeking a judgment in the principal amount of $120,000

which is the benefit amount provided in Petitioner's policy of insurance. Petitioner timely (not later than November 4, 1974) removed the cause to the U.S. District Court for the Eastern District of Michigan on grounds of diversity of citizenship; 28 USC §§1332, 1441, and 1446. On December 2, 1975, the U.S. District Court, the Honorable Philip Pratt presiding, entered a summary judgment for Petitioner, filing, on the same date, its Memorandum Opinion. (Appendix A.) The Court found, in essence, that Respondent's decedent's death did not occur as a result of "pyogenic infections which shall occur simultaneously with and through an accidental cut or wound." The Memorandum Opinion did not discuss Petitioner's contention that the secondary contributory factor in the death, diabetes mellitus, was "any kind of sickness or disease" barring recovery under the accidental death policy. Respondent's subsequent appeal resulted in the Court of Appeals' Order filed May 3, 1977 (Appendix B, page 19) remanding the case for further proceedings. Petitioner's petition for rehearing was denied by Order dated June 15, 1977. (Appendix B, page 20)

REASONS FOR ALLOWING THE WRIT

The U.S. District Court, in a detailed and specific Opinion, gave judgment on undisputed facts to Petitioner. (Appendix A) In remanding, the Court of Appeals said only that "facts [are] not sufficiently uncontroverted." (Appendix B, page 19) The Court of Appeals' Opinion was without explanation and, in Petitioner's view, without justification; it is in conflict with applicable decisions of this Court, and has so far departed from the accepted and

usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This case presents no disputed issues of fact, the Court of Appeals (Appendix B) to the contrary notwithstanding. In response to Petitioner's motion in the District Court, Respondent filed a single affidavit (Appendix C) which, for purposes of the motion, Petitioner specifically accepted as true. App. 44a. At the argument before the District Court on November 24, 1975 (App. 41a), counsel for Respondent conceded that there were no genuine issues of fact between the parties: "I think that there is substantial agreement on what the facts are in this case, and I think that Mr. Sparrow [attorney for Petitioner] has fairly represented them to the Court." App. 48a.

The U.S. District Court, aware of the stated positions of the parties, began its Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment by reference to "the following uncontroverted fact situation." (Appendix A) The Court of Appeals in its May 3, 1977, Order (Appendix B, page 19), stated without explanation "that facts developed thus far do not appear to be sufficiently uncontroverted to warrant summary judgment." The Court of Appeals' denial of Petitioner's subsequent Petition for Rehearing was no more enlightening than its earlier order. (Appendix B, page 20)

The question which was presented upon the motion for summary judgment in this case is a legal one: what meaning is to be given, on the facts particularly as recited in the Zaleski affidavit (Appendix C), to the contractual requirement that death be from "pyogenic infections which shall occur simultaneously with and through an accidental cut or wound." In *First National Bank of Arizona* v *Cities Service Co,* 391 US 253 (1967), a Court of Appeals' affirmance of summary judgment granted in the U.S. District Court in an anti-trust case, was upheld. The Court said at 290:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, [no one is] entitled to a full-dress trial notwithstanding the absence of significant probative evidence tending to support the complaint.

In the case at bar, Respondent's only evidence was contained in the Zaleski Affidavit and stated plainly that the pyogenic infection was the direct result of a post-operative wound infection, and the direct result in turn of the surgical placement of the Jewett nail in Respondent's decedent's hip. This evidence was fully accepted by Petitioner. Because the pyogenic infection indisputably appeared to have occurred as a result of the intentional act of surgery, and because these circumstances did not equate to simultaneous occurrence with and through an accidental wound, the District Court granted Petitioner's Motion as a matter of law. Respondent's counsel's argument on the Motion in the U.S. District Court supports this conclusion: "The infection incurred [sic] at the time of the opening of the body—that is, at the time that the surgical incision was made." App 52a. See also Appendix C, paragraph 9.

"The presence or absence of genuine issues of material fact is to be gauged as of the time judgment was entered by the district court." *Sound Ship Building Corp* v *Bethlehem Steel,* 533 F2d 96, 101 (3rd Cir, 1976), *cert. den.* ..... US ..... (1977). If the only evidence a court should consider in a summary judgment setting is that which is presented by testimony or sworn affidavits, *Adickes* v *Kress,* 398 US 144 (1970), any speculation by any court about any other possible facts is improper. This seems particularly so

where, as here, the Court of Appeals has not seen fit to reveal whatever specific reasons it may have had for concluding that "the facts [are] not . . . sufficiently uncontroverted."

Petitioner suggests that the Court of Appeals may not ignore the position of all of the litigants, and of the trial court, that there is no factual dispute. While it is surely the function of a Court of Appeals to determine "whether a genuine issue exists and whether the law was applied correctly," (10 Wright & Miller *Federal Practice & Procedure* §2716 at pages 437-8 and cases there cited), it appears that this function generally requires the Court of Appeals to take the facts "to be as alleged in the complaint and stipulated by the parties." *Wolverine Insurance* v *Tower Iron Works,* 370 F2d 700, 702 (1st Cir, 1966). Only in complex cases of immense public importance, *Kennedy* v *Silas Mason,* 334 US 249 (1947), or perhaps cases in which the conceded facts suggest development under another legal theory, but which is fully explained by the Court of Appeals, *Smith* v *US,* 362 F2d 366 (9th Cir, 1966),[2] should the requirement be otherwise.

This Court, in *Fountain* v *Filson,* 336 US 681 (1949), criticized and reversed a Court of Appeals decision which sustained the entry by a District Court of summary judgment, but which went on to examine factual evidence afresh and to conclude that a judgment should be rendered by the District Court in favor of one of the parties. The nature

[2]The District Court in *Smith* granted the Government's Motion to Dismiss under Fed R Civ P 12(b)(6); the Court of Appeals noted that because material other than the pleadings was examined the Motion should have been treated as one under Fed R Civ P 56. Even if correctly decided, the holding in *Smith* does not support the Court of Appeals' Opinion in this case.

of this Court's criticism was that the Court of Appeals should not act with finality on a new issue where the opposite party had had no opportunity to present a defense. By analogy, this case appears to suggest that a Court of Appeals may not originate supposed disputes of material facts, where the litigants at the District Court level had no such disputes.

It is true enough that Respondent at the Court of Appeals level, for the first time asserted that there were disputed issues of fact. But "the rule requires that the opposing party present some evidence which supports the bald assertion that there is a dispute." *Donnelly* v *Guion,* 467 F2d 290, 293 (2nd Cir, 1972). The only evidence properly before the Court was the Zaleski Affidavit, and the facts in that Affidavit supported the judgment rendered as a matter of law for Petitioner by the District Court.[3]

[3]In addition to saying that the facts were not sufficiently uncontroverted, the Court of Appeals also said (Appendix B) that "there is ambiguity in the exception clause relied upon by both parties." Petitioner maintained at all times that the clause was unambiguous, and Respondent seemed both at the trial level and at the Court of Appeals to concede that the clause was unambiguous. The U.S. District Court in its opinion said (Appendix A at page 17): "While the disputed exclusionary clause of the policy is not a model of clarity or precision, this Court is unable to agree that it is ambiguous." Although there is no suggestion as to what it was that the Court of Appeals found "ambiguous" in the contractual provisions of the policy, the only word in the clause whose definition was ever disputed was the word "simultaneously." Respondent's suggested interpretation of this word as meaning "at the same time" or "coincident in time," App. 30a, was expressly adopted in the District Court by Petitioner. Petitioner respectfully suggests that no further trial court proceedings will result in a determination that "simultaneously" means something other than what Respondent (App. 30a, 31a), Petitioner (App. 43a, 55a), and the trial court (Appendix A at page 17) all agreed that it meant. Nor does it appear that the meaning of the word "simultaneously" is an issue of fact of the sort which requires a "full-dress trial" for its resolution.

At the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice held April 7-9, 1976, as reported in an excerpt from an address entitled "Agenda for 2000 A.D.—Need for Systematic Anticipation," at 62 ABAJ 727 (1976), Chief Justice Burger said ". . . what we seek is the most satisfactory, the speediest, and the least expensive means of meeting the legitimate needs of the people in resolving disputes." Rule 56 is such a means. To give effect to the function intended for summary judgment procedures under Rule 56, an appeal from the disposition of a summary judgment motion should be treated the same as an appeal from the disposition of a full-dress trial. This would require that the considerations which justify reversal of the determination of the District Court be specified, thereby enabling it to overcome what the Appellate Court regards as erroneous action at the trial which must then be held. But if, as here, a Court of Appeals for undisclosed reasons may conclude that these means are unavailable, then summary judgment procedures are nothing but time-consuming delusions, and the Federal Rule which purports to authorize such procedures should be abrogated.

The importance of resolution of this case as here presented is indeed critical to the administration of justice. Such resolution will be instructive on the further utility of summary judgment procedures. It may provide guidelines for disposition of other District Court-granted motions for summary judgment by Courts of Appeal. "Whatever may have been the situation two centuries ago, or even a century ago, today the administration of justice is a highly complex and technical enterprise. What we must face up to is whether a process so intricate and so

complex can continue to be guided — if "guided" is the correct word — by haphazard, casual, and un-co-ordinated approaches." *Chief Justice Burger's 1977 Report to the American Bar Association,* 63 ABAJ 504, 505 (1977). Finally, it will spare litigants and trial court the unpromising tasks of guessing at whatever issue of fact it was that could have prompted the Court of Appeals to return a matter such as this to the District Court, and of trying the case as though there were issues of fact where, as shown in the record, no issues of fact exist.

CONCLUSION

Petitioner urges the Court, as ultimate repository for the administration of the system of justice in the United States, to accept certiorari in this case. U.S. Const., art III; 28 USC §2072. Petitioner requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,
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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SIGMUND G. ZAWACKI,
Plaintiff,

vs.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY, a foreign corporation,
Defendant.

CIVIL ACTION
No. 4-72739

JUDGMENT

The above-entitled matter having come on before the Court upon the defendant's Motion for Summary Judgment; and the matter having been submitted on the briefs of counsel and the Court having filed its written Opinion therein,

IT IS ORDERED that the defendant's Motion for Summary Judgment be and it is hereby granted and the plaintiff's complaint be and it hereby is dismissed.

/s/ PHILIP PRATT
United States District Judge

Dated: December 2, 1975
Detroit, Michigan

(Title of Court and Cause)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this suit for the collection of the proceeds of an accidental death policy, the defendant has moved for summary

judgment pursuant to Rule 56, of the F.R.C.P. It argues that there is no genuine issue of fact and that as a matter of law judgment should be granted in its favor.

FACTS

Two distinct issues are raised by the parties which can be best understood in the context of the following uncontroverted fact situation. The plaintiff, Dr. Sigmund G. Zawacki, subscribed to a Group Accident Policy issued to plaintiff by defendant Provident Life & Accident Insurance Company. This policy covered Dr. Zawacki and his dependents and was in effect on February 23, 1974. On that date, Ann O. Zawacki, the wife of the plaintiff, sustained a fracture of her left hip as the result of an accidental fall, in Jamaica, the West Indies. She was transported back to Michigan and on February 25, 1975, a surgical team at Oakwood Hospital in Dearborn, Michigan, placed a pin ("a Jewett nail") in her left hip to affix the fracture. She developed staphylococcal septicemia as a direct result of the pin implacement. This is generally considered to be a "pyogenic infection." She was discharged after the surgery but her condition worsened and she expired on April 15, 1974. The autopsy revealed that the cause of death was staphylococcal aureus, coagulase and septicemia, the primary contributing factor of which was the infected left hip fracture. A secondary contributing factor was diabetes mellitus.

The defendant Provident Life has refused to pay on the insurance contract claiming that the circumstances are within an explicitly stated exception to the coverage, which states:

> "No Accidental Death Insurance shall be payable for any loss caused directly or indirectly, wholly or partly by:
>
> (a) Mental infirmity, ptomaines, bacterial infections (except pyogenic infections which shall occur simultaneously with and through an accidental cut or wound), or any kind of sickness or disease."

It contends (1) that the diabetes mellitus was a contributing factor to the death of Mrs. Zawacki and therefore payment under the contract is precluded by the "sickness or disease" exception, and (2) that the infection did *not* occur "simultaneously with" the accidental wound.

DISCUSSION

Initially the Court notes several apparent inconsistencies in accompanying affidavits which reinforce plaintiff's contention that there exists a disputed issue of fact as to the "contributing nature" of the diabetes. However, because the Court concludes that the second issue is dispositive of the action, it will not discuss the first issue.

The parties agree that the hip fracture was accidental, that it occurred on February 23, 1974, that the hip surgery and pin implantment were performed on February 25, 1974 and, finally, that the infection was the direct result of the surgical implantment of the Jewett Nail. The only disputed issue is one of law: whether a pyogenic infection arising in this manner is one which has "occur[red] simultaneously with and through an accidental cut or wound" as provided for in the insurance contract.

Arising as this case does, under the diversity jurisdiction of the federal court, the law of the State of Michigan

is most applicable to this analysis. The Court is required to first consider the pertinent language in the context of the entire contract. If the language of the policy is unambiguous, it must be interpreted and applied as written, in its plain, popular and ordinary sense. *Wozniak* v. *John Hancock Mutual Life,* 288 Mich. 612 (1939). Only where the language of the policy is ambiguous should it be construed by the Court, *Lehr* v. *Professional Underwriters,* 296 Mich. 693 (1941), and then it should be construed liberally in favor of the insured and strictly as against the insurer who normally prepares the contract. *Van Zanten* v. *National Casualty Co.,* 333 Mich. 28 (1952).

The initial question, then, is whether an ambiguity exists in the contested clause of this policy. The plaintiff contends that the exception relating to "pyogenic infections which shall occur simultaneously with and through an accidental cut or wound" lends itself to several reasonable interpretations. He argues that "simultaneously with" can denote an extended time period so that the surgical operation and infection is "simultaneous" with the fall and hip fracture, although temporally separated by two days.[1] The defendant on the other hand contends that "simultaneously" is akin to "instantaneously" and that the wound and infection, to be covered, must occur at the same time.

[1] It is not clear from plaintiff's brief but conceivably he also argues that the "accidental wound" was not the breaking of the hip, but rather the surgery itself, and that the wound was "accidental" in the sense that the subsequent infection was an unintended result. This argument was rejected in *Connecticut General Life* v. *Allen,* 64 F.2d 840 (8th Cir. 1933), *cert, den.* 291 U.S. 681 (1933) where the contract provision was *identical* to the one in dispute here. The man died from infection resulting from surgical removal of an impacted tooth. The issue was whether the wounds or cuts were accidental or not. The court held that since the dentist made the cuts intentionally, without error, to remove the tooth, the wound was *not* accidental. This would also appear to be the situation at bar.

While the disputed exclusionary clause of the policy is not a model of clarity or precision, this Court is unable to agree that it is ambiguous. "Simultaneously" by popularly accepted standards, means "at the same time." One must carefully examine the context to determine what is meant by the occurrence of two things "at the same time." Certainly in the context of the exclusionary clause, "simultaneously" does not mean at the same instant; for the infection must necessarily be the result of the cut or wound. One produces or causes the other and necessarily must precede it.

Yet while some leeway must be given, "simultaneously" is not normally used to describe the juxtaposition of two events separated by several days (with perhaps the exception of events occurring on a grand scale). The insurance contract provision refers to a very discrete event, the infliction of a wound, juxtaposed with the "occurrence of an infection." This reflects a very short temporal span.

Moreover, the Court believes that the reasonable interpretation of the parties' intent in this provision is to cover only infections *directly* caused by the wound or cut. To be sure the pyogenic infection in this case was in the causal chain of events resulting from the injury, but by admission of the parties, it was not the *direct* result of the wound; rather, it was a derivative or indirect result.

The only fair reading of the entire phrase, i.e., "simultaneously *with* and *through* an accidental cut or wound" dictates that the infection took root or had its genesis while the injury-causing cut or wound was open and untended. For example, when as the result of an automobile collision the insured has an open wound which is contaminated by bacteria as he is dragged along or thrown onto a highway,

the exception would not exclude coverage (assuming the type of infection is pyogenic). In the case at bar, not only is there no indication that the fracture created an open cut or wound, but, on the contrary, that the wound which gave rise to the opportunity for infection was surgically made and intentional.

The Court is of the opinion that any other reading of the clause in context would not be reasonable, therefore, the provision cannot be considered ambiguous. Based on the interpretation the infection did not occur "simultaneously with and through" the wound and is not covered under this policy. As this is the plaintiff's sole ground for claiming benefits under the policy and it has been found without merit as a matter of law, therefore, for the reasons given above, the defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

/s/ PHILIP PRATT
United States District Judge

Dated: December 2, 1975
Detroit, Michigan

APPENDIX B

No. 76-1442

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIGMUND G. ZAWACKI,
Plaintiff-Appellant,

vs.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY, a foreign corporation,
Defendant-Appellee.

ORDER

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

On receipt and consideration of an appeal from summary judgment dismissing a complaint on an accidental death insurance policy; and

Noting that there is ambiguity in the exception clause relied upon by both parties; and

Noting further the complexity of the medical problem involved and that facts developed thus far do not appear to be sufficiently uncontroverted to warrant summary judgment,

Now, therefore, the judgment of the District Court is vacated and the case is remanded for further proceedings.

Entered by order of the Court
/s/ JOHN P. HEHMAN
Clerk

May 3, 1977

(Title of Court and Cause)

ORDER

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

On receipt and consideration of a petition for rehearing in the above-styled case; and

Noting therein no issue of substance presented which was not taken fully into account prior to issuance of the court's opinion,

Now, therefore, said petition is denied.

Entered by order of the Court
/s/ JOHN P. HEHMAN
Clerk

June 15, 1977

APPENDIX C

(Title of Court and Cause)

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

EDWARD J. ZALESKI, being first duly sworn, deposes and says as follows:

1. That he is a medical doctor duly licensed to practice medicine in the State of Michigan.

2. That he has been engaged in the private practice of medicine, specializing in Internal Medicine, for the past thirteen years at 4521 Firestone, Dearborn, Michigan, and that during that time he engaged in medical research at Wayne State University Medical School for four years.

3. That he is a Clinical Assistant Professor of Medicine at Wayne State University School of Medicine.

4. That he treated Ann O. Zawacki in her last illness from February 25, 1974, until she died on April 15, 1974.

5. That her death was caused by a pyogenic infection, staphylococcal septicemia, which was the direct result of a post-operative wound infection.

6. That the said infection was the direct result of the surgical placement of a Jewett Nail in her left hip to reduce a fracture of the left hip and that she developed the infection in her left hip during her hospitalization for the said surgery.

7. That diabetes mellitus was considered a significant factor because medical experience shows that many diabetic persons have problems with infections.

8. The accident itself with the resulting infection was sufficient to cause the death of Ann O. Zawacki independent of her diabetic condition.

9. The infection was coincidental with the insertion of the Jewett Nail.

Further Deponent sayeth not.

/s/ EDWARD J. ZALESKI, M.D.

Subscribed and sworn to before me
this 18th day of November, 1975.
/s/ MARY FRANCES DETLOE
Notary Public, Wayne County, Michigan
My commission expires: 9-12-77

Supreme Court, U. S.
FILED
AUG 29 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

NO. 77-177

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Petitioner,

vs.

SIGMUND G. ZAWACKI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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RULE CITED

Rule 56, Federal Rules of Civil Procedure 2, 6, 8

In The

Supreme Court of the United States

October Term, 1977

NO. .....

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Petitioner,

vs.

SIGMUND G. ZAWACKI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

When counsel for Petitioner, Provident Life and Accident Insurance Company, was asked on oral argument by the Judges of the Sixth Circuit Court of Appeals why this relatively basic contract action had been removed by Provident from the Wayne County, Michigan, Circuit Court to the Federal District Court, counsel replied to the effect that Provident decided on the removal because it was assured of a higher calibre of judicial officer in the

Federal system. Apparently, counsel would now except from that statement at least three Judges of the Sixth Circuit.

Petitioner asserts to this Court that "this petition presents an important question relating to the scope and applicability of Fed R Civ P 56, governing summary judgment, and relating to appellate review of its judgment rendered thereunder". An examination of Petitioner's complaint relating to the actions of the Appeals Court panel discloses nothing more than a petulant claim that the Court of Appeals did not write a full-blown formal opinion in returning the matter to the District Court for ultimate trial.

The short answer to Petitioner's complaint is that the Court Rules do not require the extended form of opinion Petitioner appears to prefer. The practical answer to Petitioner's complaint is that the opinion of the Court of Appeals, taken together with the pleadings, briefs and oral arguments, is adequate and clear to all affected parties.

THE BASIC FACTS ARE CONTROVERTED BY PETITIONER

The contract clause at issue in this matter provides:

> "No Accidental Death Insurance shall be payable for any loss caused directly or indirectly, wholly or partly by:
>
> "(a) Mental infirmity, ptomaines, bacterial infections (except pyogenic infections which shall occur

> simultaneously with and through an accidental cut or wound), or any kind of sickness or disease."

The Court of Appeals, in reversing summary judgment for Defendant-Appellant, stated that "facts developed thus far do not appear to be sufficiently uncontroverted to warrant summary judgment," (Appendix B).

By way of example, Respondent pleaded, paragraph 13 in his complaint:

> "That the staphylococcus aureaus, which primarily caused Ann O. Zawacki's death, was a bacterial pyogenic infection which occurred simultaneously with and through the accidental wound in her left hip."

Paragraph 13 of Petitioner's answer states:

> "PROVIDENT denies the allegations in paragraph 13."

Petitioner's denial of the fundamental facts which are at issue in determining the question of coverage liability has never been withdrawn by Petitioner. Respondent's burden as plaintiff is to establish that the accidental death of his wife was caused directly or indirectly, wholly or partly, by a pyogenic infection which occurred simultaneously with and through an accidental cut or wound. Whether the death was caused by accidental means, whether it was caused directly or indirectly or wholly or partly by a pyogenic infection and whether the pyogenic infection occurred simultaneously with and through an accidental cut or wound are all questions of fact which, unless properly admitted by Petitioner as defendant, are to be resolved by the trier of the facts.

A jury demand has been filed in this case and the ultimate trier of the facts at issue is the jury, not the

District Court. That Petitioner seems somewhat confused on this point, see page 5 of its Petition wherein it stated that "The Court found, in essence, that Respondent's decedent's death did not occur as a result of 'pyogenic infections which shall occur simultaneously with and through an accidental cut or wound.'" This supposed "finding" is, of course, the heart of the lawsuit and not within the District Court's power where a jury has been demanded. The effect of such a "finding" is to deprive Respondent of his right to a jury determination of contested facts.

Until Petitioner admits the allegations of paragraph 13 of the complaint, the "facts developed thus far do not appear to be sufficiently uncontroverted to warrant summary judgment," as found by the Court of Appeals.

THE PROVISIONS OF THE INSURANCE CONTRACT

The Court of Appeals also noted (Appendix B to Petitioner, p. 19) "that there is ambiguity in the exception clause relied upon by both parties;" as a basis for reversing the summary judgment granted by the District Court. In attacking that finding by the Court of Appeals, Petitioner, in footnote 3, p. 9, seeks to create the impression that the parties are in agreement that the exception clause is unambiguous because each of the parties claimed that the clause was unambiguous. Of course, what Petitioner does not reveal to the Court is the fact that it claims that the exception clause in question is unambiguous and means one thing, while Respondent claims that the same clause is unambiguous and means something else, and that both parties disagree with the interpretation placed thereon by the District Court, which also claimed the clause to be unambiguous.

The interpretation of the clause by the District Judge is set forth in Appendix A to the Petition. That interpretation is disclaimed by Petitioner, Respondent and the Court of Appeals.

Petitioner's interpretation of the exception clause is that *the pyogenic infection* and *the accident* must occur simultaneously in order for the exception clause to apply. The Respondent would point out that the word "accident" does not even appear in the exception clause.

Respondent's interpretation of those same words is that the events which must occur simultaneously are the occurrences of the infection *with* the cut or wound and *through* the cut or wound. The District Court held (p. 17, Appendix A to Petition) that the accident must precede in time the infection.

In discussing the differences of interpretation of this clause, Petitioner stated in its Brief to the Court of Appeals, pp. 8, 9:

> "Appellant (Respondent herein) says again and again that Provident has conceded that the pyogenic infection occurred 'with and through' the accidental cut or wound. . . . It is apparently Appellant's belief that if he repeats this proposition often enough, it will be somehow deemed true.
>
> "Let there be no mistake on this point. One of the many reasons that Appellant should not recover,

in the circumstances of this case, is that the 'with and through' test, in the operative phrase 'pyogenic infections which shall occur simultaneously *with and through* an accidental cut or wound,' has not been met. That Provident has conceded this issue is only wishful thinking on Appellant's part." (Emphasis added.)

In the conclusion portion of its Brief (p. 12), Petitioner stated:

> "Because the pyogenic infection in this case did not occur at the same time as, and with and through, the event Appellant claims to constitute the 'accidental . . . wound' (Appellant's brief at page 5), and because a pyogenic infection 'shall occur' at the same time as the accident in order for Appellant to recover, Appellant should not recover."

On this record, the holding of the Court of Appeals that there is ambiguity in the exception clause relied upon by both parties is eminently correct.

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THE SUMMARY JUDGMENT PROCEDURE UNDER RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

Petitioner, in questioning the actions of the Court of Appeals, has demonstrated that it is itself confused as to "the scope and applicability" of Rule 56. In its motion for summary judgment, Petitioner stated: "For purposes of this motion only, Provident concedes that 'staphylococcal septicemia' is a pyogenic infection, and Provident confines itself, as to this motion only, to the issue of whether such alleged pyogenic infection occurred 'simultaneously with and through an accidental cut or wound.'"

Thus, the only factual concession made by Petitioner in support of its motion for summary judgment is that staphylococcal septicemia is a pyogenic infection. It does not now concede, and never has conceded, that the pyogenic infection occurred "simultaneously with and through an accidental cut or wound".

Petitioner suggests in the petition, p. 6, that the question of whether the infection occurred simultaneously with and through an accidental cut or wound is a legal question, not a factual question. Yet, on page 5, it asserts that the District Court *found* "that Respondent's decedent's death did not occur as a result of 'pyogenic infections which shall occur simultaneously with and through an accidental cut or wound.'"

Since it is Respondent's contention that the pyogenic infection did occur simultaneously with and through an accidental cut or wound, and since Petitioner refuses to stipulate or admit that the pyogenic infection occurred simultaneously with and through an accidental cut or wound, the "finding" of the Court is directly contrary to the Respondent's allegations alleged in the complaint, and supports Petitioner's denial of those ultimate facts set forth in its answer.

Petitioner has admitted the presence of a pyogenic infection "for purposes of this motion only". This concession would be appropriate only in the situation where the motion for summary judgment is based on the allegation that the opposing party has failed to state a claim upon which relief can be granted. Such a limited con-

cession is not appropriate, under Rule 56, where the Court undertakes to render summary judgment on the ground that "there is no genuine issue as to any material fact". Nor is the District Court empowered under Rule 56 to resolve contested issues of fact.

Petitioner would have this Court resolve this entire matter based upon its one limited concession that "for purposes of this motion only . . . 'staphylococcal septicemia' is a pyogenic infection,". It misrepresents to this Court in the section headed "Reasons for Allowing the Writ", p. 5, that the District Court "gave judgment on undisputed facts to Petitioner." and makes substantially the same misrepresentation subsequently.

The "facts are not sufficiently uncontroverted" because Petitioner controverts the basic facts. Petitioner is not entitled to deny the fundamental facts on the one hand and obtain a summary judgment on the other hand based upon the verity of those same facts. Nor is Rule 56 a device for avoiding a jury determination of disputed facts.

Respondent invites Petitioner to amend the answer filed by it in this case to admit those allegations of fact alleged by Respondent in the complaint. At such point there would be no genuine issue as to any material fact and *either* party would be entitled to bring a motion for summary judgment under Rule 56.

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CONCLUSION

The finding by the Court of Appeals that the matter in the present state of the record is not appropriate for disposition by summary judgment is obviously a correct decision.

Respondent requests that this Court deny Petitioner's application for writ of certiorari.

Respectfully submitted,

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